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THE JURISTIC PERSON.—I.

It was probably a mathematician that first conceived the plan of feigning an unreality as a convenient step in the formation of an hypothesis, and then, having established his theory, conveniently let his fiction disappear. The law has been playing with such a fiction for centuries, in the course of which, the fiction, instead of disappearing, as it so conveniently does for the mathematician, has increased in girth and height, and has maintained its ghostly existence, in the face of the anathema of the philosopher and the fiat of the judicial decree. In an evil day the law, like the hospitable Arab, who permitted his camel to shelter his head within the domestic tent, gave shelter to an imaginary person—the *persona ficta*,—then an infant, seemingly of little promise and of precarious tenure of life. It has repaid the hospitality of the law, even as the camel rewarded his master—by making the legal household permanently uncomfortable. The law, awakening to the peril of housing so sturdy an unreality, has smiled uneasily, and said, "You are but a fiction—you do not exist, really," and then, apparently on the principle of Christian Science, has tried to ignore its existence. But the *persona ficta* will not be ignored. He is a corporation, a collective person, a legal fiction, a convenient factor in legal reasoning, but, real

or fictitious, he emerges uncannily from every fiat of extinction, much after the fashion of Antaeus who, cast to earth, renewed his vitality.

The corporation too, person or not, has attributes, for we know them as good and bad—they too, are sheep and goats. When they are wronged they set the machinery of the criminal law in motion—when they do wrong, the law is puzzled to find a fiction responsible for a crime, in which, it seems, the actor is not the only one whose hands show traces of guilt. Here, we might think, the law could well end the ghostly fiction by destroying it. But, neither the law nor we have yet arrived there.

Much of the learning that has been built up about the terms "legal fictions," "fictitious persons," "entities," "artificial being" has become cant. A vague connotation belongs to each of these terms which enables the casual user of it to apply it to the correct problem; of the consequences of the application he is ignorant, and there is little or no relation between theory and practice. The most uninformed mind has an idea of capacities, and can even follow the ramifications by which a man by marrying his first cousin, loses some of his second cousins, or becomes second cousin to his own children, but the separation of individual wills from collective wills is a task which even the academic mind has but unsatisfactorily accomplished. Let us see what is here involved. Dobson, Hobson, Jopson and others form a corporation. Each receives stock, Dobson is president, and Hobson secretary. They have a board of directors and own property. Now who owns the property? Dobson, Jopson, *et al.*, or the vague personality connotated by the term corporation. Is it, in fact, a personality? Dobson and the rest own stock, *ergo, no property.* The directors do not own it; all the stockholders together cannot alienate it, the corporation can. And the corporation is the sum of the volitions of all the stockholders expressed in unity of action. It is this individual, this aggregate of wills that has aroused all the controversy. What name shall we give it? Person, collective property—*persona ficta*—the name is very nearly a

matter of indifference so long as we understand by it an existence distinct from the members that compose it; for, be it understood, one may be a member of this corporate body and yet deal with it—may sell to it—buy from it,—in fact, maintain business relations with it, precisely as he does with any other natural person.

The matter begins with dogma; men, in law and in philosophy are natural persons. This might be taken to imply that there are also persons of another sort. And that is a fact. They are artificial persons or corporations, and they exist because associations of large groups of men can conduct enterprises impossible to any member of the group as an individual. It has been hinted that it is a matter of moment to determine what kind of body it is that results from the combination. Is it an individual or can you still recognize in it A, B, C, and D, of whom it is composed? Many things can be effected by corporations, impossible to individuals. Many things are so peculiarly individualistic in their natures that they are impossible to corporations. They cannot practise law and I suppose they would not be permitted to preach sermons, although many think a syndicate that attended to the writing of sermons might do some good. And of course, they cannot enter into family relations, marriage and the like.

It was said by an eminent authority that when a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted.[1]

Now the state is a body of this kind, and beginning with the state and coming down by successive gradations, we encounter by the way, the subordinate state, which, if autonomous, is the next body of this sort, the self governing county, district, or department; finally the municipal corporations such as cities, boroughs or townships. We have very

[1] The Trade and Combination Laws, A. V. Dicey, 17 Harvard Law Review, 513.

little difficulty in recognizing that when the state acts, it is a different matter from the action of any member or citizen of the state. If the state owe money, it is not owing by the citizens; nor if half the citizens emigrated would anyone think of following them to collect from each, his proportion of the debt.

It is not a conception that the rationalistic mind finds easy. Anaylsis seems to indicate that Hobson, Jopson, *et al.* are masquerading under an alias and that this entity, juristic person, or what you will, is simply Hobson, Jopson and the company. Yet a suspicion is felt that when we undertake to deal with this same *persona ficta,* we find in it Hobson, Jopson, *et al.,* plus something more—plus the corporation. And for this plus some formula must be devised.

In the jargon of the schoolmen, corporations must be "persons" or "not-persons;" that is, the corporation may be a real person or the corporation may be merely a collection of individuals. Between these two extremes any number of views is possible, each being as a rule, a modification of the one or the other. Thus the corporation may be regarded as a fictitious being, an ancient doctrine. Or corporate holding may be regarded as a form of collective property. Or, corporate action may be regarded as the act of a representative majority—that is to say, it is a peculiar form of agency.

It is to be remembered that we are in search of a formula to express an artificial creature, through which more and more of the world's affairs seek accomplishment. The meaning of the name chosen is not a matter of indifference. If an act amounting to crime be effected in the guise of corporate action, the fact that a non-consenting minority has acted by representation, though in the specific case unwillingly, makes all participants in a delict, and the innocent share the guilt. But if we are dealing with a real person, the collection of all the wills of the body, to it must be attributed the guilt of the delict, while those who execute the crime, are *particeps criminis.* For criminal acts byond the sphere of corporate action, of course, only those committing the acts could, in any case be held answerable.

The terms *persona ficta,* juristic person, or *personne morale* are the terms most generally employed to designate the organization through which corporate action is effected. Those which exist for the purpose of administering governmental powers are known as public corporations. Those which are conducted for the purpose of enriching private individuals are known as private corporations. For the purposes of the present inquiry the distinction is not important, our problem being to determine the nature of the person, being, or group, through which the will of the collection of members of the corporation finds expression.

It can scarcely be an exaggeration to lay half of the litigation with which our courts are filled, at the door of corporations. And the business of the world is absorbed by corporations in a corresponding proportion. That the status of such a creature, person, or collection of individuals cannot long remain undefined, is not matter for argument. A corporation cannot be for one purpose, so many men, for another purpose a person, and for another purpose, a fiction. As an individual, real or feigned, it must pay its debts; as a holder of certain rights, it, as a whole, as an individual, must be able to vindicate those rights; as the organizer of concerted efforts that result at times in violation of the law, it must in some way be amenable to the criminal as well as the civil law. Before we can deal with the collective body, either as a subject of law, that is, as a definite holder of rights, as a party to transactions, or as an object of law, that is, something for whose benefit laws may be passed, upon which benefits may be conferred, or against which prohibitions may be directed, it is necessary to decide whether this collective body is or is not a person. For the corporation must for certain purposes be taken as a unit. Whether it is a demand of convenience, or whether it arises from the necessity of assuring the group an existence longer than that of human life, the name by which the corporation or state is known stands for a unit of some kind. The demand of convenience exists in the case of an enormous railroad corporation, the stockholders of which are scattered

throughout the countries of civilization. And the unit known as the X railroad company, whether personified or not, connotes wealth, aggressiveness, power and whatever other attributes are conjured up by the bare mention of the name. The necessity for perpetual existence compels personification of the state, to designate the mind of an entire people in action. A kind of personification, hence, is inevitable, if it go no farther than the identification of a certain group with a name.

The Persona Ficta. Let us suppose the necessity of personification admitted, but keep in mind clearly that the personification is objective—that it proceeds from without. Subjectively—intrinsically—no person exists, but since we desire to deal with the corporation as an individual, we shall find it convenient. It is unreal, yet there may be a corporation though it have no members left. Its members may change without change in the corporation. "If it is allowable to illustrate one fiction by another," remarks a celebrated author, "we may say that the artificial person is a fictitious substance conceived as supporting legal attributes." [2] If age were surety for worth, the fiction has age for its sponsor. The conception of the *persona ficta* is an inheritance from the Roman Law, developed and expanded by the ecclesiastical lawyers of the Middle Ages, and bestowed on modern legal thought by Savigny. Real men are united to form a fictitious being; a fiction which holds property. It has necessarily, no natural rights. The theory hence, has no regard for members; nor can the *persona ficta* exist except by virtue of some creative act of the state.

All of the sophistry of the Middle Ages was insufficient to maintain the proposition that a fiction could own property; could absorb rights at the grant of the state, could occupy a definite position in the community, a position unequivocally different from that of its members; could by name sue and be sued; could recover property in which the right of no member could be identified.

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[2] Pollock, Contract, Sixth Edition, p. 108.

Men who did their own legal thinking broke loose from the traditions of Roman law and looked at the corporation anew. Upon one of them, a German, George Beseler by name, there dawned the fact that he was regarding not a fictitious, but a real being.[3] He dared to contradict Savigny, to criticise him, and to set up an analysis of the conception of the corporation as a personality based not on Roman, but on *a priori* principles. The spectral *persona ficta* showed then what manner of man he was. He appeared full panoplied for war, and heaped ridicule and contumely on the usurper—the fiction called the juristic person, a myth. But Beseler[4] and Gierke, his disciple, had attacked their problem with an equipment of mentality and erudition[5] that would not be denied and their labors had this for its achievement, that the *persona ficta* was banished from the German Civil Code, and the juristic person took its place as a member of the legal family. For a shadowy fiction, never supported by adequate analysis, never justified upon any ground stronger than that of convenience, they substituted a theory, scientifically developed, practical, and susceptible of some moral interpretation. Its principles were these.

The Juristic Person.—A right is inconceivable without corresponding relations between some individual and the community to which he is subject. If we find a right, such as that of ownership, in existence, we must discover a subject for that right. If the right attach to a human being, he is the subject; if it attach to a name used to designate the collective will of a group of men, the name or collective will is the subject. By advanced abstractions, by reasoning *a priori,* jurists have reached the conclusion, that in relation to the quality of being a subject of law, the individual, and the group of individuals as such, occupy a like position. Personality is considered therefore, an attribute not only of men, but of groups of men, acting as a unit for the

[3] Gierke, Genossenschaftstheorie, Einleitung, 1.

[4] Georgē Beselér, Volksrecht und Juristenrecht (1893), pp. 158, *et. seq.;* System des Deutschen Privatrechts, vol. 1, sec. 66, *et seq.*

[5] Gierke, Genossenschaftstheorie.

attainment of a common end. This person, which is not a human being, is called technically, a juristic person, a *personne morale* to distinguish it from the physical personality of mankind.

The term juristic person is simply the legal expression for this fact, that above the individual or specific human existence there stands generic human existence. In other words, when we encounter the problem of defining, interpreting, explaining, the actions of human beings in groups, as such, as contrasted with the action of any members of the group as individuals, the group stands for genus, and the individual stands for species.

The collective will of a group of men so acting and holding property, when recognized as a subject of law, or as having legal subjectivity, or more plainly, when recognized as capable of holding definite legal rights, is no more a fiction than is the personality of any human being.

This juristic person, or collective will of the group, is not a creation of the law; the law does not create its personality, but finding a group engaged in some common pursuit, endows it with a definite legal capacity. It is capable of exercising rights, capable of committing wrongs; the former, it may vindicate; the latter it must atone for.

It may seem a far cry from the question of the legality of a fine imposed upon a corporation in an amount greater than that of its capital stock, to the apparently academic discussion of its personality or non-personality, yet they are in fact so intimately related that our legal system cannot ignore the relation without affecting its stability. If men as individuals can do acts that require intent, and men acting in groups cannot, the community must restrict the activity of men in groups.

Accordingly continental legal systems have met the prob-

[*] It must be understood, that for convenience in reasoning of legal relations, the German jurists view rights, subjectively and objectively. The person in whom a right inheres, is the subject of the right; but the person toward whom a right is directed is the object of the right, for example, the beneficiary of a trust. Again, viewing a right subjectively and objectively—the owner is the subject of the right, viz., ownership; the property is the object of the right, viz., ownership.

[†] Bürgerliches Gesetzbuch, Planck, vol. I, pp. 90-159, secs. 21-89.

lem, and have adopted the juristic person as a full-fledged and useful member of society, albeit with some coyness respecting the nature of its personality. Thus, the German Civil Code devotes an entire title to juristic persons, but in Planck's edition it is very judiciously observed, "the status of a juristic person is independent of the presence of a will power. The Burgerliches Gesetzbuch does not express itself concerning the juristic construction of juristic personality; it speaks of associations and guilds having legal capacity, without defining them further." The Spanish code defines juristic persons as, 1. "Corporations, associations and organizations of a public nature recognized by the law. Their personality begins from the very instant in which they have been formally established in accordance with the provisions of the law. 2. Associations of a private nature, whether civil, mercantile or industrial, to which the law concedes personality independent of that of each of the associates."[8]

The appearance of the juristic person as a member of legal society has not been accepted by all writers as an unmixed blessing. "This subject," says Planiol,[9] "which, thirty years ago, languished in abject poverty, has become an inexhaustible theme of controversy. German industry has had for its achievement to toss into chaos this elementary principle; there are two ways in which men may hold property—individually and collectively." [10]

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[8] Código Civil, Lib. I, Tit. II, secs. 35-39.

[9] Planiol, Droit Civil, Tome I, Quatrième Edition, p. 973, sec. 3014.

[10] In English the literature of the juristic person is confined to monographs and magazine articles, and these very few in number. They are: Freund, The Legal Nature of Corporations; Maitland, Introduction to Political Theories of the Middle Age, a translation from Gierke; Maitland, Moral Personality and Legal Personality, Journal of Comparative Legislation, vol. 14, p. 192, 3.

The principal French works are: Vauthier, Etude sur les personnes morales Duguit, L'Etat, le droit objectif et la loi positive, 2 vols. 1901-1903; Jusserand, Essai sur la proprieté collective; Vareilles Sommiĕrse, Les personnes morales. The most important thesis is that of Mr. Negulesco, Paris, 1900; see also Mestre, les personnes morales et la probléme le leur responsibilité penale.

The principal German works are Brinz, Pandekten, edition of 1888,

The secret of personality, viewing the corporation as a form of collective property, is contained in the possession or absence of property. Thus, in France, the state is the largest form of collective holding; its property is the national domain, and the various properties, public buildings and the like which it acquires; and it is recognized in all countries as a person. The next personified division of government is the department, which likewise holds property; next communes and syndicates of communes; then sections of communes, in all, five superposed categories of juristic persons, which represent distinct masses of collective riches, of local, governmental, and national significance. All of these, either by common consent or by virtue of legislation, are regarded by the law as persons.[11]

When we reach the *canton* and the *arrondissement,* we cease to have persons; they are not invested with personality, and there are no funds, no resources subject to their control; they have no patrimony. It is a question, therefore, not of personality, but of patrimony. Where there is property, there is personality. Where there is no property, there is no personality.[12]

Thus much for the holding of property. For the actions of groups of men, collective actions, there is no reason, no justification, no authority but that of might. Beginning with the state, and proceeding downward to private corporations, control proceeds from the power of the strong over the weak.

"Human groups," says Duguit, in his dramatic way,[13] "based upon community of needs, upon diversity of individual aptitudes, upon the reciprocity of services rendered;

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sec. 432, *et seq.;* Zitelmann, Begriff und Wesen der so genannten juristischen Personen, Gierke Die Genossenschaftstheorie und die deutsche Rechtsprechung, Beseler, Volksrecht und Juristarecht (1843), pp. 158, *et seq.;* System des Deutschen Privatrechts, vol. I, sec. 66, *et seq.;* Gierke, Deutsches Privatrecht (1895).

[11] Planiol, op. cit., p. 978, sec. 3023; Loi du 22 Mars, 1890, art. 170; at. 1.

[12] Planiol, op. cit., p. 979, sec. 3024.

[13] Duguit, L'Etat, vol. 1, p. 15.

in these human groups, some individuals stronger than others, whether because they are better armed, or because we recognize in them some supernatural power; whether because they are richer, or because they are more numerous, and who, thanks to this superior power, can impose their will on others; these are the facts. Let us call the state a human group, settled upon a definite territory, where the stronger compel obedience of the weaker, and we are agreed. Call political sovereignty that power which the stronger exert over the weaker, there is no controversy. Proceed beyond this and we enter the realm of hypothesis. To say that this will of those who rule is only imposed upon individuals because it is the collective will, is a fiction conceived to justify the power of the strong—a fiction, ingenious enough, invented by the prophets of force to legitimate force, but for nothing else."

The existence of so prolonged a debate, upon a problem of so many varied solutions, in itself indicates a lively interest in the results to be obtained from a solution that will bear analysis. For the ordinary transactions of commerce, there are no problems, and no solution is needed. It may be that for the purpose of buying and selling the rights of parties may be conserved by saying that collective property is buying from individual property. But when collective property has paralyzed the wheels of industry; when it has loomed up as a blind, insatiable monster, soulless and conscienceless, a fund, with the absorptive powers of some pre-historic sponge; when, in short, collective property directs what we shall pay for transportation, the quality of food, the length of our working day, and regulates human life to a daily increasing extent, we cannot dismiss responsibility for its acts, when they threaten at times the well-being of the community with the airy phrase, collective property. For there are good collective properties and bad collective properties; good fictions and bad fictions; good genera and good species; good juristic persons and bad ones. Even when torts are committed, the English law and the American law have a resource in civil responsibility—in the liability of

a master for the acts of his servant. But where an act is committed for which an individual might be held liable criminally, the law stops with the observation that the corporation can be guilty neither of fraud nor of crime. Notwithstanding, the crime or the fraud may have been committed and the corporation may have reaped the profit.

Returning for a moment to the state, which is everywhere recognized as a person, it has been observed truly, that the feeling that even the state is a very unreal person, may not readily be dispelled.[14] But the difficulty is purely subjective; the existence of personality apart from a body is insufficiently concrete. Yet the notions of ownership, or of incorporeal rights are equally esoteric. And if personality offer a solution, the difficulty of the conception ought not to stand in the way.

If now, we attempt to define our problem we shall find the facts to be these.

Corporations, under existing legal systems, for judicial or legislative purposes are regarded in two ways:

I. The corporation is a fictitious person or entity (as in England and the United States).

II. The corporation is a real person (as in Germany, France, Spain, and some other continental countries).

The problems arising under both of these attitudes are these:

A. Does the corporation as a group or unit possess rights and owe duties?

B. Has the corporation as a group or unit criminal or moral responsibility?

C. What is the nature of the shareholders' interest?

If again, we examine the nature of corporate existence with reference to proffered solutions, we shall find again, that the corporation is a fictitious person, or a real person, or a form of co-ownership, or a form of agency or action by representation. It remains to consider these views with reference to the extent to which they resolve the problem.

George F. Deiser.

[14] Maitland, Moral Personality and Legal Personality, lib. cit., p. 196.